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# SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1959

# No. 80

# SCRIPTO, INC., ETC., APPELLANT,

vs.

## DALE CARSON, AS SHERIFF OF DUVAL COUNTY, FLORIDA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

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# IN THE CIRCUIT COURT IN AND FOR DUVAL COUNTY, FLORIDA IN CHANCERY NO. 95915-E

Division E

Scripto, Inc., a corporation organized and existing under the laws of the State of Georgia, Plaintiff,

-vs-

AL CAHILL, as Sheriff of Duval County, Florida, and RAY E. GREEN, as Comptroller of the State of Florida, Defendants.

## BILL OF COMPLAINT-Filed July 11, 1957

The plaintiff, Scripto, Inc., by its undersigned attorneys, brings this its bill of complaint against Al Cahill, as Sheriff of Duval County, Florida, and Ray E. Green, as Comptroller of the State of Florida, and alleges:

I

The plaintiff, Scripto, Inc., is a business corporation organized and existing under the laws of the State of Georgia, with its principal office and place of business at Atlanta, Georgia.

#### II.

The defendant, Ray E. Green, is the duly elected Comptroller of the State of Florida and, under the provisions of Chapter 212, F. S. 1951, is the officer of this State charged with the duty of assessment and collection of all Sales and Use Taxes imposed by Chapter 212, F. S., known as "the Florida Revenue Act of 1949". The defendant, Al Cahill, is the duly elected and constituted Sheriff of Duval County, Florida and as such is the officer charged with the duty of executing any warrants issued by the defendant Ray E. Green for the purpose of enforcing collection of the aforementioned taxes in the said county.

The defendant Green, as Comptroller of the State of Florida, has assessed against the plaintiff at sales and use tax under the foregoing statute and has issued a distress warrant, and the defendant Cahill, as Sheriff of Duval County, Florida, is now in the process of executing the same. The plaintiff contends that such assessment, distress warrant and threatened execution thereon are illegal and invalid, and should be enjoined by reason of the facts hereinafter stated.

#### IV:

The plaintiff Scripto, Inc. manufactures at its plant in Atlanta, Georgia mechanical writing instruments which it sells to independent jobbers throughout the United States, including the State of Florida. Since November 1, 1953, and prior to that time, Scripto, Inc. has employed a salesman who resides in Jacksonville, Florida, and who covers the entire State of Florida soliciting orders on behalf of Scripto, Inc. from such jobbers. The sole authority of this salesman is to solicit orders of the regular Scripto line for sale to jobbers, and to forward such orders to the home office of Scripto in Atlanta, Georgia. This salesman has no authority to accept or reject orders, to approve credits or to make collections. The orders which the salesman. receives and transmits to Atlanta are reviewed by the company for the purposes, among others, of determining the availability of items ordered and approval of credit; and if the order is accepted, the order is consummated by shipment in interstate commerce, f.o.b. Atlanta, by delivery to common carrier or by delivery to the United States Postal Department for delivery to the jobber in Florida. All of said sales are sales for resale in Florida, since the writing instruments purchased by the jobbers are resold by them to various retail stores which in turn sell to the ultimate con-[fol. 4] sumer. Scripto, Inc. does not own, lease or maintain in the State of Florida any office, distributing house, sales, room, warehouse or other place of business. It dees not maintain in the State of Florida any bank account, any stock of merchandise or any other property.

In connection with the sales described in the preceding paragraph, Scripto, Inc. distributes, free of charge, to such jobbers metal merchandising displays which contain the mechanical writing instruments sold to the jobber, and which also serve to display the instruments on the counter of the retailer. Scripto, Inc. makes no charge for such display containers, and they, like the writing instruments contained in them, are not used or consumed by the jobber, but are redistributed by him to various retail stores in the State of Florida.

#### VI.

Adgif Company is a division of Scripto, Inc., and also has its principal office and place of business in Atlanta, Georgia, but such office is in a different location from that of Scripto, Inc., and Adgif is operated as a separate and distinct company. Adgif is in the business of selling mechanical writing instruments with advertising matter printed thereon. Customers of Adgif do not reself such writing instruments, but distribute the same, free of charge, as a means of advertising their respective businesses. The method and means of distribution of Adgif products is separate and distinct from the distribution system of Scripto, Inc., alleged in Paragraph IV above. The regular Scripto salesman employed in Florida does not solicit orders for Adgif products, nor does he in any way aid, assist or have any connection whatsoever with Adgif sales or distribution. Adgif employs no salesmen; orders for Adgif products are so-[fol. 5] licited by independent manufacturers, representatives, jobbers and commissioned merchants in the State of Florida. Such merchants are not in any sense employees or agents of either Adgif or Scripto, Inc., nor are they in any way controlled or directed by either Adgif or Scripto, Inc. Orders for Adgif products solicited by such merchants are sent directly to the home office of Adgif in Atlanta for acceptance or refusal, and if accepted, the independent merchant is paid an agreed commission by Adgif, and the sale is consummated by shipment in interstate commerce, f.o.b. Atlanta, by delivery to common carrier or by delivery to the United States Postal Department for delivery to the

#### VII.

That on December 2, 1955 Scripto, Inc. received a notification from F. G. Merrin, Assistant Director, Use Tax Division, Comptroller's Office, State of Florida, demanding that Scripto register as an out-of-state dealer under F.S.A. Section 212.05 and requesting a schedule of all advertising materials and equipment which Scripto, Inc. had sent into Florida since November 1, 1953.

#### VIII.

That on February 9, 1956 the plaintiff, through its attorney, Mr. George B. Haley, Jr. of Atlanta, Georgia, in-[fol. 6] formed the defendant, Ray E. Green, that in their opinion, Scripto was not subject to the jurisdiction of the State of Florida so as to be required to register as a dealer under the provisions of F.S.A. Section 212.05. Subsequent to the said date, several conferences were held between the plaintiff through its authorized representatives and J. N. Aycocke, Director of the Use Tax Division, 'Comptroller's Office, State of Florida, representative of the defendant, Ray E. Green. As a result of these conferences, the State Comptroller's Office has declared that the State of Florida has such jurisdiction over Scripto, Inc. as to require it lawfully to register as an out-of-state dealer as to the Adgif sales. Further, the authorized representative of the State Comptroller, Mr. Aycocke, has ruled that the display stands which Scripto furnishes free of charge to its customers in the State of Florida are for use and consumption within the

meaning of Section 212.05(2) of the Florida Statutes and hence a use tax is due therefrom.

At these conferences, the plaintiff, through its authorized representative, took the position that Scripto, Inc. could not be lawfully required to register as an out-of-state dealer or to collect the use tax with respect to sales by Adgif Company to purchasers residing in Florida, since such sales do not result by reason of any business done by either Scripto, Inc. or Adgif Company in the State of Florida, and that to require Scripto, Inc. to register as a dealer and to collect the said use tax with respect to such sales would constitute an unreasonable burden upon interstate commerce, in violation of Article I, Section 8 of the Constitution of the United States, and would deprive plaintiff of its property without due process of law, in violation of Amendment XIV of the Constitution of the United States, and Declaration of. Rights, Section 12 of the Constitution of the State of Florida. At said conferences, plaintiff took the further position that any display containers which it had supplied to jobbers in the State of Florida are not subject to the Florida Use [fol. 7] Tax Act, Section 212.05(2), six the same are not sold by Scripto, Inc. and are not distributed by Scripto, Inc. for use or consumption in the State of Florida; and that even if such display containers be distributed by Scripto, Inc. for use or consumption in the State of Florida, the same are exempt from the Florida Use Tax Act as containers within the meaning of Section 212.02(3)(b) of that Act.

### IX.

On November 9, 1956 at a conference between the duly authorized representatives of the plaintiff and the defendant Ray E. Green, the plaintiff was informed that it would be useless to further discuss the subject and that the Comptroller would assess against the plaintiff a use tax due upon the above noted transactions in accordance with Section 212 of the Florida Statutes.

#### X.

Thereupon, on July 8th, 1957, the Comptroller assessed against the said plaintiff, including Adgif Company, a divi-

sion of the plaintiff, a sales and use tax for the period ending December 3, 1956, in the principal amount of \$3,732.37, with interest in the amount of \$485.20, and penalties in the amount of \$933.09, aggregating in all \$5,150.66. Said aggregate assessment is based on sales and use taxes/alleged by the Comptroller to be due for the years 1953, 1954, 1955 and 1956 with respect to all sales by Adgif Company in the State of Florida for that period, and with respect to display containers distributed by Scripto, Inc. to jobbers during that same period. The aggregate tax, interest and penalty claimed by the Comptroller to be due is broken down as follows:

4	1953	.1954	1955	1956	Interest	Penalty
Adgif Sales	\$783.98	\$966.23	\$1086.58	\$590.16	\$445.50	\$856.74
Display Containers		100.72	109.09	95.61	39.70	76,35

[fol. 8] On the 8th day of July, 1957, the said Comptroller issued a distress warrant in said aggregate amount of \$5,150.66 and delivered the same to the defendant Al Cahill, Sheriff of Duval County, Florida, and the said last named defendant is now in the process of executing the said distress warrant by garnishing accounts owed to the plaintiff by certain of its customers located in Duval County, Florida.

#### XI.

Plaintiff alleges that the said assessment with respect to the sales of Adgif Company is illegal and invalid for the following reasons:

- (1) Scripto, Inc. is not required by the provisions of the Florida Sales and Use Tage Act, Chapt. 212, Florida Statutes, to register as an out-of-state dealer and collect the sales and use tax upon sales by Adgif Company, because such sales do not arise by reason of any business done by either Scripto, Inc. or Adgif Company in the State of Florida.
- (2) If said Statute be construed to require Scripto, Inc. to register as an out-of-state dealer and to collect the sales and use tax upon sales of Adgif Company, it imposes an unreasonable burden upon interstate com-

merce, in violation of Article I, Section 8 of the Constitution of the United States, and deprives the plaintiff of its property without due process of law, in violation of Amendment XIV of the Constitution of the United States and Declaration of Rights, Section 12, of the Constitution of the State of Florida, and the said Statute is, therefore, invalid,

#### XII.

Plaintiff alleges that the said assessment is illegal and invalid insofar as the same is based upon the cost of display [fol. 9] containers distributed by Scripto, Inc. to jobbers in the State of Florida for the reason that said display containers are distributed by Scripto, Inc. to jobbers in the State of Florida who in turn redistribute such display containers to retailers, and the distribution by Scripto, Inc. is not for use or consumption in the State of Florida within the meaning of Section 212.05(2) of the aforesaid statute; and for the further reason that said display containers are specifically exempt from the imposition of the Florida Sales and Use Tax by the terms of Section 212.02(3)(b) of the said statute,

#### XIII.

That unless defendants are enjoined from their attempted collection of the aforementioned invalid and illegal taxes, interest and penalties, plaintiff's property in Duval County, Florida will be levied upon and otherwise restrained, therefore unlawfully interfering with the plaintiff's property rights and rights under the Constitution and laws of the United States and the State of Florida and otherwise causing irreparable harm and injury to plaintiff for which there is no remedy at law.

Wherefore, plaintiff prays that this Court will declare and decree that the aforementioned assessment of taxes, penalties and interest against the plaintiff is illegal and invalid and that this Court will grant a temporary injunction pendente lite restraining and enjoining the defendants, their agents, servants, deputies and employees from collecting or attempting to collect the aforesaid taxes, penalties and interest from plaintiff and enjoining and restraining them severally and their respective agents, servants, deputies and employees from levying upon, attaching, dis-[fol. 10] training selling plaintiff's property in Duval County to enforce said warrant, and that said temporary injunction may be made permanent upon final hearing herein.

Davisson F. Dunlap of Adair, Ulmer, Murchison, Kent & Ashby, 1215 Barnett Bank Building, Jacksonville, Florida; George B. Haley, Jr. of Smith, Kilpatrick, Cody, Rogers & McClatchey, Hurt Building, Atlanta 3, Georgia, Attorneys for Plaintiff.

Duly sworn to by Davisson F. Dunlap, jurat omitted in printing.

[fol. 11] [File endorsement omitted]

IN THE CIRCUIT COURT
IN AND FOR DUVAL COUNTY, FLORIDA
IN CHANCERY

[Title omitted]

Answer of Defendant, Al Cahill, Sheriff of Duval County, Florida—Filed August 5, 1957

Comes now the Defendant, Al Cahill, Sheriff of Duval County, Florida, by his undersigned attorney, and in answer to the Complaint herein says:

1. Said Defendant admits that he is the Sheriff of Duval County, Florida, and as such is charged with the duty of executing any warrants issued by the Honorable Ray E. Green, Comptroller, for the purpose of collecting statutory taxes; and at the present time does have a distress warrant in his hands for execution upon assets of the Plaintiff, and will make such execution unless otherwise enjoined herein.

- 2. Defendant denies each and every other material fact contained in said Complaint, upon the grounds that he has no knowledge of the same.
  - S. Perry Penland, Attorney for Defendant, Al Cahill, Sheriff of Duval County, Florida, 703 Atlantic National Bank Bldg., Jacksonville 2, Florida.

I Hereby Certify that copy of the foregoing has been furnished Adair, Ulmer, Murchison, Kent & Ashby, Attys for Plaintiff, 1215 Barnett Bank Bldg., Jacksonville, Florida, by mail, this 1st day of August, 1957.

S. Perry Penland

[fol. 14] [File endorsement omitted]

IN THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DUVAL COUNTY, FLORIDA

IN CHANCERY No. 95915-E

Division "E"

[Title omitted]

Answer-Filed September 3, 1957

The defendant, Ray E. Green, as Comptroller of the State of Florida, for his answer and other defenses to the Complaint herein says:

#### First Defense

That said Complaint fails to state a cause of action against this defendant.

#### Second Defense

- 1. That this defendant admits the allegations of Paragraph I of said Complaint.
- 2. That this defendant admits the allegations of Paragraph II of said Complaint.

- 3. That this defendant admits the allegations of Paragraph III of said Complaint.
- 4. That this defendant admits that the plaintiff manufactures, at its plant in Atlanta, Georgia, mechanical writing instruments which it sells in the State of Florida, and that plaintiff employs a salesman who resides in Jackson-ville, Florida and who solicits orders on behalf of Scripto Inc. in the State of Florida; and this defendant further admits that shipments are made by the plaintiff from Atlanta, Georgia to the State of Florida for delivery to the purchaser of same in Florida, as alleged in Paragraph [fol. 15] IV of said Complaint, but this defendant is without knowledge as to the truth of the other and further allegations contained in said Paragraph IV of said Complaint.
- 5. That this defendant admits that the plaintiff distributes to its enstowers in Florida, certain merchandising displays as alleged in Paragraph V of said Complaint; and in connection with such allegation as contained in said Paragraph V of said Complaint, this defendant says that said merchandising displays are for use and consumption within the State of Florida, within the intent and meaning of the provisions of Section 242.05(2), Florida Statutes; but this defendant is without knowledge as to the truth of the other and further allegations contained in said Complaint:
- 6. That this defendant admits that "Adgif" is in the business of selling mechanical writing instruments with advertising matter printed thereon, and that "Adgif" ships such writing instruments to persons in Florida who purchase such merchandise sold by "Adgif," as alleged in Paragraph VI of said Complaint; and in this connection, this defendant further says that said merchandise so purchased by persons in the State of Florida and shipped to persons in the State of Florida within the intent and meaning of Section 212.05(2), Florida Statutes; and in further connection with the allegations contained in said Complaint, this defendant says that "Adgif" is merely a trade name used

and employed by the plaintiff for the conduct of certain phases of the plaintiff's business, and that the plaintiff, itself, is engaged in the business described in said Paragraph VI of said Complaint as the business of "Adgif"; and this defendant is without knowledge as to the truth of the other matters and things alleged in said Paragraph VI of said Complaint.

- 7. That this defendant admits the allegations of Paragraph VII of said Complaint, except that this defendant is without knowledge as to the exact date the plaintiff received the notification from the authorized representative of this defendant as alleged in said Paragraph VII of said Complaint.
- 8. That this defendant admits that it has been and is plaintiff's contention that the plaintiff contends and has contended that it is not required to register as a "dealer" [fol. 16] under the provisions of Chapter 212, Florida Statutes, and that this defendant contends and has contended that plaintiff is required to register as such "dealer"; and that plaintiff is further required to collect the use tax on merchandise shipped into the State of Florida for use and consumption therein; and that plaintiff has refused to register as such "dealer" and to collect said use tax, and continues to so refuse as alleged in said Paragraph VIII of said Complaint.
- 9. That this defendant admits the allegations of Paragraph IX of said Complaint, but in connection with the allegations of said Paragraph IX of said Complaint, this defendant further says that this defendant determined that it was useless to further discuss with plaintiff's representatives the matter of registration and collection of said use tax under the provisions of Chapter 212, Florida Statutes in that plaintiff continued to fail and refused to register as a "dealer" and collect said use tax under the provisions of Chapter 212 Florida Statutes.
- 10. That this defendant admits the allegations of Paragraph X of said Complaint.
- 11. That this defendant admits that plaintiff alleges that the assessment for use tax, penalties and interest is

invalid, as alleged by plaintiff in Paragraph XI of said Complaint, but this defendant denies that said assessment is invalid as alleged by plaintiff in said Paragraph XI of said Complaint, and in this connection, this defendant says that the assessment by this defendant against the plaintiff for the use tax described in said Complaint, and the requirement of the said Chapter 212, Florida Statutes that plaintiff register as a "dealer" and collect use tax on merchandise shipped by plaintiff into the State of Florida, for use and consumption within the State of Florida, is a valid exercise of the taxing authority of the State of Florida.

- 12. That this defendant denies that the assessment by this defendant against the plaintiff for use tax tax (sic) based on the cost of display containers shipped by plaintiff [fol. 17] into the State of Florida for use and consumption within the state of Florida is invalid as alleged in Paragraph XII of said Complaint, and this defendant further denies that said display containers are specifically exempt from the imposition of said use tax by the terms of Section 212.02(3)(b), Florida Statutes, as alleged in said Paragraph XII of said Complaint, and in this connection, this defendant further says that the assessment by this defendant against the plaintiff of use tax upon the cost of said display containers is a valid exercise of the taxing power of the State of Florida.
- 13. That this defendant denies the allegations of Paragraph XIII of said Complaint, except in connection with the allegations contained in said Paragraph 13 of said Complaint, this defendant says that upon this Court determining that the plaintiff is validly subject to the said provisions of said Chapter 212, Florida Statutes, that it will call upon the defendant, Sheriff of Duval County, Florida, to levy on any property of the plaintiff found within said Duval County, Florida, for the payment of said tax assessment.

#### Third Defense

That this defendant denies each and every the allegations contained in said Complaint, except those matters expressly admitted in this defendant's foregoing Second Defense.

Barnes, Barnes, Naughton & Slater, Thomas W. Barnes, 812 Greenleaf Building, Jacksonville, Florida, Attorneys for Defendant, Ray E. Green, as Comptroller of the State of Florida.

Certificate of Service (omitted in printing).

[fol. 18] > [File endorsement omitted]

IN THE CIRCUIT COURT
IN AND FOR DUVAL COUNTY

[Title omitted]

STIPULATION OF FACTS-Filed October 1, 1957

The parties to the above stated case do hereby stipulate and agree that the said case may be tried upon the following facts without further proof thereof:

1

The plaintiff, Scripto, Inc., is a business corporation organized and existing under the laws of the State of Georgia, with its principal office and place of business at Atlanta, Georgia and has not qualified as a foreign corporation to do business in the State of Florida.

2

The defendant, Ray E. Green, is the duly elected Comptroller of the State of Florida and, under the provisions of Chapter 212, F.S. 1951, is the officer of this State charged with the duty of assessment and collection of all Sales and Use Taxes imposed by Chapter 212, F.S., known as "the Florida Revenue Act of 1949". That the defendant, Al Cahill, is the duly elected and constituted Sheriff of Duval County, Florida, and as such is the officer charged with the [fol. 19] duty of executing any warrants issued by the defendant Ray E. Green for the purpose of enforcing collection of the aforementioned taxes in the said county.

3

The defendant Green, as Comptroller of the State of Florida, has assessed against the plaintiff a use tax under the foregoing statute and has issued a distress warrant, and the defendant Cahill, as Sheriff of Duval County, Florida, is now in the process of executing the same.

4.

The plaintiff Scripto, Inc. manufactures at its plant in Atlanta, Georgia, mechanical writing instruments which it sells to independent jobbers throughout the United States, including the State of Florida. There are approximately 150 such jobbers in the State of Florida who regularly purchase from Scripto. Some of these jobbers ship part of such Scripto merchandise to retailers without the State of Florida for ultimate retail sale or ultimate use or consumption. The matters and things hereinafter described, however, refer only to sales, use and consumption of such Scripto merchandise within the State of Florida. Since November 1, 1953, and prior to that time, Scripto, Inc. has employed a salesman who resides in Jacksonville, Florida, and who covers the entire State of Florida soliciting orders on behalf of Scripto, Inc. from such jobbers. The sole authority of this salesman is to solicit orders of the regular Scripto line for sale to jobbers, and to forward such orders to the home office of Scripto in Atlanta, Georgia. A sample copy of the order form on which all such orders are taken is attached hereto as Exhibit "A" and made a part hereof. This salesman has no authority to accept or reject orders, to approve credits or to make collections. The orders which [fol. 20] the salesman receives and and (sic) transmits to Atlanta are reviewed by the company for the purposes, among others, of determining the availability of items ordered and approval of credit, and if the order is accepted, the order is consummated by shipment in interstate commerce, f.o.b. Atlanta, by delivery to common carrier or by delivery to the United States Postal Department for delivery to the jobber in Florida.

All of said sales are sales for resale in Florida, since the writing instruments purchased by the jobbers are resold by them to various retail stores, which in turn sell to the ultimate consumer. Scripto, Inc. does not have any other employee in the State of Florida and does not own, lease, or maintain in the State of Florida any office, distributing house, salesroom, warehouse, or other place of business.

It does not own or maintain in the State of Florida any bank account, any stock of merchandise or any other property.

5

In connection with the sales described in the preceding paragraph, Scripto, Inc. distributes to such jobbers metal merchandise display containers which contain the mechanical writing instruments sold to the jobber and which also serve to display the writing instruments on the counter of the retailer. No separate charge is made by Scripto to the jobber for such display containers. A sample circular issued by Scripto, picturing the several types of such display containers and showing that no separate charge is made for the container, is attached hereto as Exhibit "B" and made a part hereof. Such display containers, like the writing instruments contained in them, are not used or consumed by the jobber but are redistributed by him with the contents intact to various retail stores in the State of Florida, where such containers are used by the retail stores to display the merchandise and replacement merchandise ordered by the retailer. A jobber pays to Scripto the same price for the [fol. 21] same quantity of writing instruments whether or not such writing instruments are delivered in a display container. Scripto, Inc. does not retain title to such display containers nor does it require that either the jobbers or the retail dealers return such containers to Scripto.

6. 4

Adgif Company is a Division or Department of Scripto, Inc. It is not a separate corporation, but is wholly owned by Scripto, Inc., and that part of the business of Scripto which is hereinafter described, is operated by Scripto under the name of Adgif Company. Adgif has its principal office and place of business in Atlanta, Georgia, and although such office is in a different location than that of Scripto, Inc., being across the street from the Scripto office, orders received by Adgif by mail-are directed to the same Post Office Box as orders by mail are directed to Scripto, Inc.

Adgif is in the business of selling mechanical writing instruments with advertising material printed thereon.

Such mechanical writing instruments are obtained by Adgif from Scripto, and the manufacturer's costs for such writing instruments are charged on the books of Scripto to that part of Scripto's business operated by or under the name of Adgif Company. Customers who purchase writing instruments from Adgif do not resell such instruments, but distribute same free of charge as a means of advertising their respective businesses.

7

The method and means of distribution of Adgif products is separate and distinct from the distribution system of Scripto, Inc. which is set out in paragraph "4" above. The regular Scripto salesman employed in Florida does not · solicit orders for Adgif products, nor does he in any way [fol. 22] aid, assist or have any connection whatsoever with Adgif-sales or distribution. Adgif employs no salesman in the State of Florida. Orders for Adgif products are solicited by independent manufacturer's representatives, jobbers and commissioned merchants in the State of Florida, and such solicitors are furnished catalogs, order forms, samples, sample case and advertising material by Adgif to assist them in solicitation of orders. At the present time there are ten such independent merehants who solicit orders for Adgif products. A copy of the Contract which Scripto has with each of such merchants is attached hereto as-Exhibit "C" and made a part hereof. Orders for Adgif products solicited by such merchants are sent directly to the home office of Adgif in Atlanta for acceptance or refusal and if accepted, payment therefor is normally made by customer directly to Adgif on such terms and in such manner as agreed upon by the customer and Adgif Company. The independent merchant is paid an agreed commission by Adgif and the sale is consummated by shipment in interstate commerce, f.o.b. Atlanta, by delivery to common carrier or by delivery to the United States Postal Department for delivery to the Florida purchaser. Under the Memorandum of Agreement between Adgif Company and independent manufacturers' representatives, jobbers and commissioned merchants, who solicit orders for Adgif products (see Exhibit "C" attached hereto) it is contemplated that

the orders taken shall be accepted by Adgif in Atlanta, Georgia, and the company reserves the right to reject any and all orders. However, if such jobber, commissioned merchant or independent manufacturers' representative obtains from the customer a check made out to the order of Adgif along with the Order, such check is forwarded with the order to Adgif in Atlanta. Copies of the order forms. which such independent merchants use in taking orders are attached hereto as Exhibit "D" and Exhibit "D-1" (Exhibit [fol. 23] "D-1" being part of an Adgif catalog) and made a part hereof. Among the terms and conditions of said order is the provision the "State and Federal taxes, where applicable, are to be paid by the purchaser." Adgif Company does not own, lease or maintain in the State of Florida any office, distributing house, sales room, warehouse, or other place of business. It does not own or maintain in the State of Florida any bank account, any stock of merchandise, or any other property.

8.

Adgif Company receives no orders for its products from consumers in the State of Florida by reason of the solicitation by the aforesaid Scripto employee who resides in Florida and who solicits orders for Scripto products, but Adgif receives orders for its products solely by reason of the solicitation activity of the aforesaid independent merchants.

9.

On December 2, 1955 the defendant Comptroller demanded that Scripto register as an out-of-state dealer under F.S.A. Section 212.05, but Scripto has refused to register.

10.

The Comptroller has assessed against the said plaintiff, including Adgif Company, under the provisions of Chapter 212 Florida Statutes, a use tax for the period ending December 3, 1956, in the principal amount of \$3,732.37, with interest in the amount of \$485.20, and penalties in the amount of \$933.09, aggregating in all \$5,150.66. Said aggregate assessment is based on use taxes alleged by the Comptroller to be due for the years 1953, 1954, 1955 and

1956, for the use and consumption in the State of Florida of said mechanical writing instruments sold by Adgif to its customers in the State of Florida, and for the use and [fol. 24] consumption of said metal display containers distributed by Scripto to jobbers in the State of Florida, who in turn distribute same to retailers for use by the retailers in displaying merchandise purchased by said retailers and contained therein at the time of distribution, and for such replacement merchandise as the said retailer might thereafter purchase from Scripto, Inc. The aggregate tax, interest and penalty claimed by the Comptroller to be due is broken down as follows:

	1953	1954	1955	- 1956 -	Interest	Penalty
Adgif Sales	\$783.98	\$966.23.	\$1086.58	\$590.16	\$445.50	\$856.74
Display Containers		100.72	109.09	95.61	39.70	76.35

On the 8th day of June, 1957, the said Comptroller issued a distress warrant in said aggregate amount of \$5,150.66 and delivered the same to the defendant Al Cahill, Sheriff of Duval County, Florida, and the said last named defendant is now in the process of executing the said distress warrant.

In Witness Whereof, the aforesaid parties, through their attorneys, have executed this Stipulation this 30th day of September 1957.

- Davisson F. Dunlap of Adair, Ulmer, Murchison, Kent & Ashby, 1215 Barnett Bank Building, Jacksonville, Florida; George B. Haley, Jr. of Smith, Kilpatrick, Cody, Rogers & McClatchey, Hurt Building, Atlanta 3, Georgia, Attorneys for Plaintiff.
- Thomas W. Barnes, Barnes, Barnes, Naughton & Slater, 812 Greenleaf Building, Jacksonville, Florida, Attorneys for Defendant, Ray E. Green, as Comptroller for the State of Florida.
- S. Perry Penland, 700 Atlantic Bank Bldg., Jacksonville, Florida, Attorney for Defendant, Al Cahill, as Sheriff of Duval County.

#### MEMORANDUM OF AGREEMENT

DATE

for orders taken by in the following territory:								
	1	for orders taken by	in	he follow	ing torri	torus		
					g terri	cory.		
			*					
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The rates of commission payable on orders accepted by Adgif Company will be as shown on "Schedule of Commissions" in effect at the time of acceptance of order by Adgif Company. Adgif Company reserves the right to revise or change its "Schedule of Commissions" at any time and from time to time.

#### PAYMENT OF COMMISSION

Orders cannot be accepted and commission paid until all necessary specifications are received.

On orders giving complete specifications the full commission is payable when the order is accepted by Adgif Company.

On orders accepted by Adgif Company under a blanket contract the commission is paid on each quantity

On orders accepted by Adgif Company the commission is paid on the quantity ordered, not on the quantity actually shipped.

Commission checks are mailed twice each week.

PROTECTION: Commissions on repeat orders from the above territory, sent to Adgif within fifteen months from date of the last order will be credited to the salesman whose name is typed herein, provided he solicited and took the last order accepted by Adgif Company from such customer, and provided he is not "inactive" name is typed herein automatically becomes "inactive" when he has not submitted for 60 days any orders accepted by Adgif Company, and protection on his account is then withdrawn.

THE ADGIF COMPANY reserves the right to reject any and all orders. The party whose name is typed herein has no authority to and shall not make collections or incur any debts involving Adgif Company. Nor shall he represent or hold himself out as an employee or agent of Adgif Company, it being the intention of the parties hereto to create the relationship on the part of the party whose name is typed herein of independent contractor.

This agreement may be terminated by either party, depositing in the U.S. Mail a notice of intention to terminate, properly stamped and addressed to the other party at his or its last known address.

The terms and conditions herein are satisfactory and the undersigned hereby agrees to be bound thereby.

Salesman

ADGIF COMPANY

Street



# ADGIF COMPA



P. O. BOX 4847

ATLANTA 2. GA.

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THIS ORDER IS AKEN SUBJECT TO CANCELLATION OR CHANGES IN SPECIFICATIONS AFTER ACCEPTANCE.

IN THE ABSENCE OF DEFINITE SHIPPING INSTRUCTIONS. THE ADGIF COMPANY, MAY AT ITS SOLE DISCRETION, SHIP BY FREIGHT. EXPRESS. PARCEL POST. OR OTHER WAYS AND DELIVERY OF THIS MERCHANDISE TO THE CARRIER MAY BE CONSIDERED DELIVERY OF TITLE AND POSSESSION OF THE MATERIAL TO THE BUYER.

DELIVERY IS SUBJECT TO DELAY CAUSED BY FIRE, STRIKE, CIVIL OR MILITARY AUTHORITY, INSURRECTION OR RIOT OR OTHER CAUSES BEYOND THE CONTROL OF THIS COMPANY.

STATE AND FEDERAL TAXES. WHERE APPLICABLE, ARE TO BE PAID BY THE PURCHASER. INTEREST AT 6% WILL BE

THE SIZE. STYLE AND ARRANGEMENT OF TYPE ARE LEFT TO THE DISCRETION OF ADGIF COMPANY, PURCHASER WAIVES. THE RIGHT OF REJECTION FOR SUCH CAUSE. CUSTOMERS SPECIFICATIONS ARE FOLLOWED AS CLOSELY AS PRACTICABLE.

THE PARTY SOLICITING AND TAKING THIS ORDER IS NOT AUTHORIZED TO COLLECT BILLS OR INCUR DEBTS FOR ANY PORTION OF THIS ACCOUNT.

THE ORDER HEREIN SHALL BE GOVERNED BY THIS WRITTEN AGREEMENT AND NO VERBAL UNDERSTANDING OR OTHER REPRESENTATION SHALL BE BINDING UPON THE PARTIES HERETO.

[fol. 93] Exhibit "D-1" to Stipulation of Facts

(See Opposite)

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[fol. 94]

IN THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DUVAL COUNTY, FLORIDA

IN CHANCERY No. 95915-E

Division "E"

Scripto, Inc., a corporation organized and existing under the laws of the State of Georgia, Plaintiff,

-vs-

AL CAHILL, as Sheriff of Duval County, Florida, and RAY E. GREEN, as Comptroller of the State of Florida, Defendants.

### FINAL DECREE December 13, 1957

This cause came on for final hearing before the Court upon the pleadings, the Stipulation of Fact filed herein by the parties, and upon exhibits introduced into evidence pursuant to written stipulation of the parties, and the Court having heard argument of counsel, and being fully advised in the premises, finds as follows:

- 1. That the plaintiff, Scripto, Inc., a corporation, as to the metal merchandise display containers shipped into the State of Florida by the plaintiff, without cost, except for the cost of merchandise contained therein, to plaintiff's jobbers in the State of Florida, and redistributed by such jobbers to retailers to be used in the State of Florida, as described in Paragraph 5 of the said Stipulation of Fact, is not required by Chapter 212, Florida Statutes 1955, to collect any use tax that might be due on said metal merchandise display containers, and remit the same to the defendant, Ray E. Green, as Comptroller of the State of Florida.
- [fol. 95] 2. That the plaintiff, Scripto, Inc., a corporation is a "dealer" within the intent and meaning of said Chapter 212, Florida Statutes 1955, as to orders solicited by independent manufacturer's representatives, jobbers and com-

missioned merchants in the State of Florida, for the sale of merchandise by the plaintiff, under the trade name of Adgif Company, upon such orders being accepted by the plaintiff in Atlanta, Georgia and shipped into the State of Florida by the plaintiff, for use or consumption therein, as described in said Stipulation of Fact; and the plaintiff is required by said Chapter 212, Florida Statutes 1955, to collect the 3% use tax on said merchandise so sold by the plaintiff for use and consumption in the State of Florida, and is liable to the State of Florida for the sum of \$4,729.19 for merchandise so shipped into the State of Florida for use therein according to Paragraph 10 of said Stipulation of Fact.

3. That the requirements of said Chapter 212, Florida Statutes 1955, that the plaintiff, as an out of state dealer, collect the use tax due the State of Florida for the use or consumption of merchandise sold by the plaintiff to Florida residents, for use and consumption as described in Paragraphs 6, 7 and 8 of said Stipulation of Fact, is a valid exercise of the taxing power of the State of Florida; is not an unreasonable burden upon interstate commerce, in violation of Article I, Section 8, of the Constitution of the United States; and does not deprive the plaintiff of its property without due process of law, in violation of the 14th Amendment of the Constitution of Rights of the Constitution of the State of Florida as contended by plaintiff.

It is, therefore, Ordered, Adjudged and Decreed:

(a) That the defendant, Ray E. Green, as Comptroller of the State of Florida, his agents, servants, deputies and employees be, and they are hereby permanently enjoined and restrained from collecting or attempting to collect from [fol. 96] the plaintiff, or requiring, or attempting to require the plaintiff, to collect any use tax that might be due the State of Florida, under the provisions of Chapter 212, Florida Statutes 1955, on account of the plaintiff delivering to jobbers in the State of Florida, metal advertising display containers, without cost, except for the cost of the writing instruments contained therein, which are redistrib-

uted by jobbers to retail merchants for their use within the State of Florida.

- (b) That upon the plaintiff paying, or upon the defendant, Al Cahill, as Sheriff of Duval County, levying upon, attaching or distraining such of plaintiff's property as will be sufficient to pay the use tax due as described in Paragraph 2 of this decree, then the entire warrant now in the hands of the said defendant shall be decreed to be satisfied, discharged and of no further force and effect.
- (c) That any and all other and further relief prayed for by plaintiff's Complaint herein, be, and the same is hereby denied.

Done and Ordered in Chambers at Jacksonville, Duval County, Florida, this 13th day of December, 1957.

Charles A. Luckie, Circuit Judge.

[fol. 97]

IN THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DUVAL COUNTY, FLORIDA

IN CHANCERY No. 95915-E

Division "E"

[Title omitted]

Notice of Appeal to the Supreme Court of Florida -Entered February 7, 1958

The plaintiff, Scripto, Inc., a Georgia corporation, takes and enters its appeal to the Supreme Court of Florida to review paragraphs (b) and (c) of the Final Decree of the Circuit Court, Fourth Judicial Circuit of Florida, in and for Duval County, Florida, bearing date the 13th day of December, 1957 in the above styled cause and recorded in the records of said Court in Book 497, page 308. In said cause Al Cahill, as Sheriff of Duval County, Florida and Ray E. Green, as Comptroller of the State of Florida are

defendants, and all parties to said cause are called upon to take notice of the entry of this Appeal:

> Davisson F. Dunlap of Adair, Ulmer, Murchison, Kent & Ashby, 1215 Barnett Bank Building, Jacksonville, Florida, George E. Haley, Jr. of Smith, Kilpatrick, Cody, Rogers & McClatchey, Hurt Building, Atlanta 3, Georgia, Attorneys for Appellant.

Done & entered this 7th day of February, 1958

Leonard W. Thomas, Clerk

By: J. Thomas, Dep. Clerk

[fol. 98] Certificate of service (omitted in printing).

[fol. 101]

IN THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DUVAL COUNTY, FLORIDA

IN CHANCERY No. 95915-E

Division "E"

[Title omitted]

Assignments of Error-Filed February 17, 1958

The plaintiff assigns the following errors upon which it intends to rely in the Supreme Court of Florida for a reversal of a portion of the Final Decree appealed from.

- 1. The Court erred in making and entering paragraphs (b) and (c) of the Final Decree, bearing the date 13th day of December, 1957, and recorded in the records of the Court in Chancery Order Book 497, p. 308, et seq.
- 2. The Court erred in finding, in paragraph 2 of said Final Decree, that the plaintiff, Scripto, Inc., a corporation, is a "dealer" within the intent and meaning of Chapter 212, Florida Statutes 1955, as to orders solicited by independent manufacturers, representatives, jobbers and commission

merchants in the State of Florida for the sale of merchandise by the Adgif Company, a division of the plaintiff, and shipped into the State of Florida.

- 3. The Court erred in finding, in paragraph 2 of said Final Decree, that the plaintiff, Scripto, Inc., is required by Chapter 212 Florida Statutes 1955 to collect a 3% Use Tax on the merchandise sold by Adgif Company, a division [fol. 102] of the plaintiff, and shipped into the State of Florida.
- 4. The Court erred in finding in paragraph 2 of Final Decree that the plaintiff, Scripto, Inc. is liable to the State of Florida for the sum of Four Thousand Seven Hundred Twenty-nine Dollars and Nineteen Cents (\$4,729.19) on account of the three percent (3%) Use Tax due for merchandise shipped into the State of Florida by Adgif Company, a division of the plaintiff.
- 5. The Court erred in finding in the Final Decree that Chapter 212, Florida Statutes 1955, required the plaintiff as an out-of state dealer to collect the Use Tax due the State of Florida for the sale of merchandise made by Adgif Company, a division of the plaintiff, and shipped into the State of Florida.
- 6. The Court erred in finding in paragraph 3 of the Final Decree that the provisions of Chapter 212 Florida Statutes 1955, when adjudged to require the plaintiff, as an out-of-state dealer, to collect the Use Tax due the State of Florida for the use or consumption of merchandise sold by Adgif Company, a division of the plaintiff, to Florida residents, is a valid exercise of the taxing power of the State of Florida.
- 7. The Court erred in finding in paragraph 3 of the Final Decree that the provisions of Chapter 212 Florida Statutes 1955, when adjudged to require the plaintiff, as an out-of-state dealer, to collect the Use Tax due the State of Florida for the use or consumption of merchandise sold by the Adgif Company, a division of the plaintiff, to Florida residents, is not an unreasonable burden upon interstate commerce in violation of Article I, Section 8 of the Constitution of the United States.

- [fol. 103] 8. The Court erred in finding in paragraph 3 of the Final Decree that the provisions of Chapter 212 Florida Statutes 1955, when adjudged to require the plaintiff, as an out-of-state dealer, to collect the Use Tax due the State of Florida for the use or consumption of merchandise sold by the Adgif Company, a division of the plaintiff, to Florida residents, do not deprive the plaintiff of its property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.
- 9. The Court erred in finding in paragraph 3 of the Final Decree that the provisions of Chapter 212 Florida Statutes 1955, when adjudged to require the plaintiff, as an out-of-state dealer, to collect the Use Tax due the State of Florida for the use or consumption of merchandise sold by the Adgif Company, a division of the plaintiff, to Florida residents do not deprive the plaintiff of his property without due process of law in violation of Section 12 of the Declaration of Rights of the Constitution of the State of Florida.
- 10. The Court erred in not granting that portion of the plaintiff's Bill of Complaint which requested that Ray E. Green, as Comptroller of the State of Florida, and Al Cahill, as Sheriff of Duval County, Florida, be permanently enjoined from collecting any Sales or Use Taxes from the plaintiff alleged to be due the State of Florida under Chapter 212, Florida Statutes, because of the sales of merchandise by Adgif Company, a division of the plaintiff, and shipped into the State of Florida.

Davisson F. Dunlap of Adair, Ulmer, Murchison, Kent & Ashby, 1215 Barnett Bank Building, Jacksonville, Florida; George E. Haley, Jr. of Smith, Kilpatrick, Cody, Rogers & McClatchey, Hurt Building, Atlanta 3, Georgia, Attorneys for Plaintiff.

[fol. 104] Certificate of service (omitted in printing).

[fol. 106]

#### IN THE SUPREME COURT OF FLORIDA JULY TERM A. D. 1958

Case No. 29,426

#### DUVAL COUNTY

Scripto, Ixc., a corporation organized and existing under the laws of the State of Georgia, Appellant,

DALE CARSON, as Sheriff of Duval County, Florida and RAY E. Green, as Comptroller of the State of Florida, Appellees.

An Appeal from the Circuit Court for Duval County, Edwin L. Jones, Judge.

Davisson F. Dunlap of Adair, Ulmer, Murchison, Kent & Ashby and George B. Haley, Jr., of Smith, Kilpatrick, Cody, Rogers and McClatchey (Atlanta, Georgia); for Appellant.

Barnes, Barnes, Naughion & Slater, for Appellees.

#### OPINION-Filed October 17, 1958

#### Thornal, J.

Appellant Scripto, Inc., which was plaintiff below, seeks reversal of a final decree adjudging it to be responsible for the collection of a Florida use tax on certain personal property. Appellees Green and Carson, who were defendants below; by cross-assignment of error challenge the correctness of the same decree relieving appellant of the responsibility for collecting the use tax on another class of personal property.

Numerous points are discussed but the major question on which our ultimate judgment turns is whether by the nature of its operation in Florida the appellant Scripto, Inc. has established such jurisdictional contacts. as to subject it to certain provisions of Chapter 212, Flor-

ida Statutes, the Sales and Use Tax Act.

The problems presented to the Chancellor below and tendered for disposition here arose out of two separate and distinct types of transactions. Scripto, Inc. is a Georgia corporation with its principal place of business in Atlanta. It is not qualified to do business in Florida as a non-resident corporation. It manufactures in Georgia certain writing instruments. It sells these instruments to independent jobbers and whólesalers in Florida, who in turn sell them to retail stores. Scripto employs one Florida salesman who resides in Jacksonville. He solicits orders from the wholesalers primarily by personal contact. The authority of this salesman is to solicit the orders for sale to Florida wholesalers. He forwards the orders to Scripto in Atlanta where. they are reviewed for various purposes. The orders are consumated (sic) by shipment via interstate commerce f.o.b. Atlanta by common carrier or post. By this means the writing instruments are delivered to the Florida wholesalers who in turn sell them to Florida, retailers for retail sales to the ultimate consumer: Scripto maintains no distributing office or other business establishment in Florida. It has no bank account or stock of merchandise or other property in Florida except the accounts owed to it by the wholesalers. In connection with sales by Scripto to Florida wholesalers for ultimate sale at retail, Scripto distributes to such jobbers metal merchandise display containers which contain the mechanical writing instruments sold to the jobfol. 108] bers. These containers subsequently serve to display the writing instruments on the counters of the Florida retailers. No separate charge is made by Scripto for these metal display containers. The price of an assortment of mechanical writing instruments includes the display container "free". The containers are not used or consumed by the wholesaler but rather are re-distributed by him, likewise without additional charge to the ultimate retailer. Scripto retains no title to the display containers nor does it in any fashion require either the wholesaler or the retail dealer to return such containers to it.

The foregoing is a summary of the factual situation which gave rise to one of the problems considered by the Chancellor. The appellee Green, as Comptroller, demanded that Scripto register as an out-of-state dealer under Section 212.06, Florida Statutes. He also demanded that Scripto collect and remit to him the three percent Florida use tax which he contended was due upon the metal display containers which Scripto furnished to the Florida wholesalers when the latter purchased an assortment of mechanical writing instruments for resale.

In order to avoid confusion we mention that we are not here concerned with any matter involving the collection of a Florida sales or use tax on these particular mechanical writing instruments. The sole question is whether under the circumstances above summarized Scripto would be required to register as a dealer and collect and remit the Florida use tax on the metal containers.

We next proceed to summarize the factual situation giving rise to the other problem considered by the Chancellor. It is this second situation which produces the major issue before us. As an entirely separate operation Scripto in Atlanta maintains a wholly owned and controlled division or department known as Adgif. Although for purposes of distinguishing the transaction which we now outline from [fol. 109] the one summarized above we refer to Adgif as such, it is in actuality merely Scripto, Inc. functioning through one of its own divisions. Adgif with its headquarters in Atlanta, Georgia, is in the husiness of selling mechanical writing instruments directly to Florida consumers. These instruments contain advertising lettering printed thereon. Adgif, of course, obtains the instruments from Scripto and ships them through interstate commerce direct to Florida customers. These customers do not purchase the writing instruments for resale but rather distribute them free of charge as a means of advertising their respective businesses. Adgif employs no salesman in Florida. The one Scripto salesman in Florida mentioned in the forepart of this opinion renders no service whatever to Adgif. He does not solicit business for them and makes no Florida contacts for them. Adgif products are solicited by some ten independent Florida brokers and commission merchants who sell the products of other manufacturers as well as those of Scripto, via Adgif. Orders for the Adgif products are solicited by these independent Florida jobbers and are mailed directly to the home office of Adgif in Atlanta

for acceptance or refusal. If the order is accepted, payment therefor is made by the Florida customer directly to Adgif in Atlanta. In some instances the Florida jobber accepts a check from the customer but this check is also payable to Adgif and is forwarded with the order. The Florida independent jobbers are paid an agreed commission by Adgif for soliciting and obtaining the orders. Like its parent Scripto, Adgif maintains no salesroom or other business establishment in Florida. It has no Florida bank account or stock of merchandise or any other property in Florida except the accounts owed to it by its Florida customers. The "Adgif situation" resulted in the second problem considered by the Chancellor when the appellee Green demanded that Scripto register as an out-of-state dealer under Section [fol. 110] 212.06, Florida Statutes. He demanded that Scripto collect and remit to him the Florida use tax on the merchandise sold to Florida customers by Adgif pursuant to the orders taken for Adgif by Florida commission merchants.

The instant case arose when the appellee Comptroller assessed against Scripto a use tax liability in the amount of \$5,150.66, including interest and penalties for the years 1953 through 1956. Simultaneously with the assessment the appellee Comptroller issued a distress warrant in the stated amount and delivered the same to the appellee Sheriff of Duval County, Florida for execution against the property of the appellant Scripto. The appellant Scripto promptly filed its complaint in the circuit court seeking a decree of the Chancellor declaring the entire assessment illegal and praying for an injunction against the enforcement of the distress warrant. A stipulation between the parties was submitted to the Chancellor. This stipulation reflected agreement on the facts summarized above.

By his final decree the Chancellor concluded: (1) Scripto is not responsible for the collection and remission of the Florida use tax on the metal display containers in which the mechanical writing instruments were delivered to Florida wholesalers for ultimate delivery to Florida retailers, and (2) Scripto was liable as an out-of-state dealer to collect and remit the Florida use tax on the mechanical writing instruments sold to Florida customers by Adgif through

interstate commerce but pursuant to the solicitations and orders taken by Florida commission jobbers in behalf of Adgif.

Scripto has appealed from that aspect of the final decree imposing upon it the duty of collecting the use tax on the Adgif sales. The appellee Green, joined by the sheriff, has cross-assigned error from that part of the final decree holding Scripto not responsible for collecting the use tax on the metal display containers.

[fol. 111] Appellant Scripto here contends, as it did in the lower court, that it is not responsible for the collection and remission of the Florida use tax on metal display containers because these containers are furnished to the Florida jobbers without charge; that the transaction constitutes a gift and not a purchase or else the sale is for resale in which the price of the display containers is included in the price of the assortment of writing instruments which it accompanies.

Adgif is a "dealer" as to Adgif sales within the meaning of Section 212.06(2)(g), Florida Statutes, since in their view they do not solicit Adgif business by "representatives" in the State of Florida. They buttress this contention with the further proposition that if the cited Florida Statute should be construed as comprehending Scripto under the circumstances, then it violates Article I, Section 8 (the commerce clause) and the Fourteenth Amendment of the Constitution of the United States, as well as Section 12 of the Declaration of Rights of the Florida Constitution.

The appellees here contend that the Chancellor committed error in holding Scripto not liable for the collection and remission of the Florida use tax on the metal display containers and, of course, take the position that the Chancellor ruled correctly in imposing upon Scripto the use tax liability in connection with the Chancellor ruled correctly in imposing upon Scripto the use tax

liability in connection with the Adgif transactions.

Reduced to its simplest terms the nub of the controversy on the first point is whether the transaction.

on the first point is whether the transaction involving the metal containers constitutes a sale to a Florida consumer requiring the collecting of a use tax. As to the Agdif transactions, the principal point is whether Scripte has established in Florida jurisdictional contacts sufficient to sup-

port the exercise of the taxing power of the state and the [fol. 112] imposition of the requirement that Scripto function as the State's tax collector.

We point out for emphasis that we are not here coneerned with the collection of the Florida Sales Tax. We should bear in mind that the instant case involves only an effort to collect the Florida Use Tax. There is, of course, a marked distinction between the two because of the nature of the imposts as well as the constitutional basis upon which the two types of taxes are grounded. A sales tax is a form. of excise tax imposed on an ultimate consumer for the exercise of the privilege of purchasing property. The State's jurisdiction is supported by the proposition that the transaction takes place within the taxing forum. A use tax, which is the one here involved, is levied on the privilege of using, storing or consuming property purchased. The use tax was developed as a device to complement the sales tax in order to prevent evasion of the payment of the sales tax by the completion of purchases in a non-taxing state and shipment by interstate commerce into a taxing forum. It also evolved as a protective measure for the benefit of retail merchants in the taxing state who would be placed at a competitive disadvantage as against shipments in interstate commerce from a non-taxing state. Obviously also the primary objective to be accomplished by these two complementary forms of taxation is to produce revenues for the operation of the government that protects the exercise of the privilege of making the purchase in one instance and of using, storing or consuming the property purchased in the other instance.

Use taxes generally have been upheld both in theory and in practice. Henneford v. Silas Mason Co., 300 U.S. 577, 81 Law ed. 814, 57 Sup. Ct. 524; United States Gypsum Co. v. Green, Florida 1958, opinion filed July 30, 1958, Gaulden v. [fol. 113] Kirk, Fla. 1950, 47 So., 2d 567; Continental Supply Co. v. People, 54 Wyo. 185, 88 P.2d 488, 129 ALR 217; State Tax Commission v. General Trading Co., Iowa, 10 N.W.2d 659, 153 ALR 602.

We now devote our attention to the ruling of the Chancellor holding that Scripto, Inc. was not responsible as a dealer for the collection and remission of the Florida use

tax on the metal display containers which were delivered without any separate charge along with an assortment of mechanical writing instruments. The appellant Scripto undertakes to support the ruling of the Chancellor by referring us to Section 212.06(1), Florida Statutes, which provides in part that the sales and use tax at the rate of "three per cent of the cost price, as of the moment of purchase, the shall be collectible from all dealers as herein defined \* . . . Appellant points out that there must be a purchase by a Florida consumer before any dealer can be required to collect either the sales or use tax. In the absence of a purchase no tax is collectible. We are then reminded-that the metal containers are delivered to the Florida wholesalers "free." There being no purchase by a Florida customer there can be no liability for the subject tax. We think the appellant properly points out that in order to justify the requirement of the collection of the use tax, there must be a purchase in the sense of acquiring title for a consideration.

Appellant offers an alternative argument which appears to us to be even stronger in support of the ruling of the Chancellor and one which more nearly comports with the logic and reason of the situation. By this argument it is pointed out that the display container furnished withoutseparate charge is a part of the assortment offered for sale and that the cost of the container is in actuality included in the price of the assortment. When the tax is ultimately collected by the Florida retailer on the sale of the writing. [fol. 114] instruments then he to that extent collects protanto the tax on the metal containers, the price of which has been included in the price paid for the writing instruments. Inasmuch as the tax, according to this argument, is actually collected by the retailer and remitted to the State in the form of a sales tax, the imposition of a use tax as urged by the appellee Comptroller would result in a duplication of the two taxes contrary to the provisions of Section 212.06(4), Florida Statutes.

Referring to the factual statement covering the metal containers it will be recalled that they were furnished by appellant Scripto to Florida wholesalers for reside to Florida merchants who in turn sold the writing instruments at

retail. In the view which we take of the instant matter; that is, that obviously the cost of the metal containers was included in the price paid for the merchandise assortment, then the composite assortment including writing instruments and the display container required by the Florida wholesaler from Scripto, Lie. was a purchase for resale within the definition of a "retail sale" under Section 212.02 (3)(a), Florida Statutes. Under these circumstances there would be no obligation on Scripto to collect and remit the use tax on the composite assortment as sold to the Florida wholesaler.

We, therefore, hold that the Chancellor ruled correctly in concluding that appellant Scripto was not obligated to register as a dealer and collect and remit the Florida use

tax on the metal display containers.

The second major point involved in this appeal presents a more difficult problem. It will be recalled that in connection with the so-called Adgif transactions Scripto contends that inasmuch as it has no regular employees or business house, bank account or other property in Florida employed in effecting these sales to Florida consumers, [fol. 115] therefore, it has no obligation under the statute to qualify as a dealer and collect and remit the Florida Use Tax. Section 212.06(2)(g), Florida Statutes, contains one of the statutory definitions of a dealer within the contemplation of the sales and use tax law. The cited section reads as follows:

"Dealer' also means and includes every person who solicits business either by representatives or by the distribution of catalogs or other advertising matter and by reason thereof/receives and accepts orders from consumers in the state, and such dealer shall collect the tax imposed by this section from the purchaser and no action either in law or in equity on a sale or transaction as provided by the terms of this section may be had in this state by any such dealer unless it be affirmatively shown that the provisions of this section have been fully complied with." (Emphasis added.)

Scripto advances the argument that it is not a dealer within the last quoted definition for the reason that in

connection with Adgif sales it is not represented by any employees in the State of Florida. It appears to be appellant's position that the Florida wholesale jobbers who solicit business in Florida in behalf of the Adgif division of Scripto are not "representatives" within the contemplation of the cited statute. It may be true that these wholesalers are not regular employees of Scripto and in their representation they operate under limited contractual authority. Nevertheless, it appears to us that to the extent of the authority granted to the Florida wholesale jobbers and the services which they render to Scripto in consideration of the commissions to be paid they are representatives of Scripto for the purpose of attracting, soliciting and obtaining Florida customers for the Scripto products. Admittedly, as the result of the solicitations of these ten or more Florida wholesale jobbers, the appellant disposes of substantial volumes of its product into the Florida consumer market. To hold that these Florida wholesalers are not "represen-[fol. 116] tatives" of Scripto-appears to us to blind ourselves to the practical realities of the relationship between the manufacturer and the wholesaler who solicits business in behalf of the manufacturer for compensation in the form of a commission and as a result of whose efforts the manufacturer is enabled to reach a consumer market that otherwise would not be available to it. We, therefore, hold that Scripto, Inc. is a dealer within the contemplation of Section 212.06(2)(g), Florida Statutes.

Having so held we are next confronted with the contention of the appellant that if the statute is so construed, it contravenes the commerce clause and the Fourteenth Amendment to the Constitution of the United States and Section 12 of the Declaration of Rights of the Florida Constitution. In this regard appellant asserts that the imposition of the use tax against the ultimate use and consumption of its commodity after it comes to rest in Florida constitutes an undue and therefore invalid burden on interstate commerce.

It is further asserted that when the State undertakes to compel appellant Scripto to register as a dealer and collect the use tax under the factual circumstances outlined, such action by the State amounts to a taking of its property without due process.

To meet the assault suggested by the arguments last epitomized we must determine whether the representation of Scripto by the ten or more Florida wholesale commission jobbers in the solicitation of Florida customers produces a sufficient jurisdictional contact between Scripto and the State of Florida as to justify the exercise of the taxing power by the State. We should have in mind that an aspectof the theory supporting the use fax is that it is an impost on the privilege of using personal property which might have been shipped into the State through interstate commerce but which has come to rest in the taxing forum and [fol. 117] has become a part of the mass of property with a taxing situs. The tax is imposed on the use after transit in interstate commerce has come to an end. The levy, of course, in actuality is imposed upon and collected from the ultimate Florida consumer who as a Florida resident enjoys the use of the property because of the opportunity afforded by the laws of the State of Florida to exercise this privilege, regardless of the source from whence the property came. We do not lose sight of the organic essential that in the imposition of a tax the lawmaking body is bound to respect jurisdictional limitations in the same fashion that a court must obtain jurisdiction in order to adjudicate the rights of litigants. However, for purposes of enforcing collection of a use tax we are not persuaded by the view that the dealer involved must necessarily be subject to the jurisdiction of the taxing forum to the extent that he would be amenable to suit in that situs. We have the view that even though a dealer is not represented in the taxing state to the extent that service of judicial process on his representative would necessarily bind him to respond in a matter in litigation; nonetheless, he can still be represented by solicitors and limited agents who contact Florida residents to the extent that jurisdictional contacts would thereby be established sufficient to support the enforced collection of the Florida use tax.

We think our position is sustained against the assault directed by the appellant by the opinion of the Supreme Court of the United States in General Trading Company, a corporation, v. State Taxing Commission of the State of Iowa, 322 U.S. 335, 64 Sup. Ct. 1028, 88 Law ed. 1309. The

factual situation in General Trading Company is almost identical to the situation presented here. The sole difference is that in the instant case the appellant was represented [fol. 148] by commission merchants who were not on its regular payroll but who nevertheless represented Scripto pursuant to a contract that authorized the Florida merchant to solicit orders and otherwise obtain business for Scripto in Florida in return for compensation to be paid in the form of a commission. The fact that General Trading Company was represented in the taxing state by regularly employed solicitors appears to offer no distinguishing characteristic that would preclude the application of the rule of that case to the situation presented by the case at bar. In General Trading Company, supra, the United States Supreme Court held that there were adequate jurisdictional contacts in the State of Iowa in the person of Iowa solicitors who contacted lowa consumers in bringing about the sale of the commodities of a Minnesota corporation to support the exercise of lowa's jurisdiction to collect a use tax on commodities shipped into lowa from Minnesota in fulfillment of the orders obtained by the solicitors in Iowa. This was held to constitute no unconstitutional impediment to or burden upon interstate commerce. The fact that the Minnesota corporation was required to collect the use tax for the State of lowa was found to be no deprivation of property without due process.

We might interpolate in passing that the Florida Sales and Use Tax Law contains the customary provisions against duplication of the tax, an allowance to the dealer for making the collection, and a reciprocal credit arrangement which credits against the Florida tax any amount up to the amount of the Florida tax which might have been paid to another state. See General Trading Company v. State Tax Commission, supra.

In the instant case appellant Scripto enjoys the privilege of being represented in Florida by numerous commissioned jobbers. In advancing the business enterprise of the appel-[fol. 119] lant these representatives enjoy the benefits and protection of the laws of the State of Florida. It is no answer to point out that the Florida representatives of the appellant operate and own independent businesses as com-

missioned jobbers. To the extent that they contact Florida consumers in the interest of advancing appellant's business and in bringing about sales of appellant's commodities to Florida customers they are just as much representatives of the appellant under the subject statute as if they were salaried employee solicitors operating pursuant to identical limitations of contract. Bear in mind that these Florida jobbers represent appellant in Florida pursuant to specific written contracts. We are not persuaded that there is any substance to the contention that the manner in which the appellant arrives at the compensation paid to its Florida representative should distinguish this case from General Trading Company, supra

We find support for the view which we here take in the opinion of the Court of Appeals of Maryland in Topps Garment Mfg. Corp. v. State of Maryland, 212 Md. 23, 128 A. 2d 595, where the Maryland court was confronted with practically the same factual situation presented to us by the case at bar. There, as here, the out-of-state corporation was represented in the State of Maryland only by solicitors who were furnished catalogs and order blanks but who were not on the payroll or under the supervision of the out-ofstate corporation for which they solicited orders. In the interest of avoiding further lengthening this opinion we will not undertake to discuss in detail the Maryland decision last cited. It summarizes rather comprehensively practically all of the decisions of the Supreme Court of the United States and other courts on the subject of the enforced collection of a use tax on commodities sold by a [fol. 120] non-resident corporation and shipped to a taxing state via channels in interstate commerce. Anyone considering the instant problem might profitably refer to the opinion in the case last cited. Under the almost identical factual situation the Maryland court concluded, as we do here, that the non-resident corporation was bound to collect the Maryland use tax.

We have not ignored the decision of the Supreme Court of the United States in Miller Brothers Co. v. State of Maryland, 347 U.S. 340, 74 Sup. Ct. 535, 98 Law Ed. 744, relied upon with considerable confidence by the appellant. We think the Miller Brothers Co. case does not control the

instant situation. There the only "jurisdictional contact" between Miller Brothers Co., a Delaware corporation, and the State of Maryland was advertising in Delaware news. papers and radio stations that reached the notice of the Maryland residents and the occasional mailing of notices to former customers in Maryland. In Miller Brothers Co. there was no actual solicitation of business in the taxing state by representatives of the Delaware corporation. The non-resident corporation maintained no representation whatsoever in the taxing state. Justifiably, it appears to us, the essential aspects of jurisdictional contact for taxing purposes were lacking. . .

It is, therefore, our conclusion that in holding that Scripto, Inc. is a dealer within the contemplation of Chapter 212. Florida Statutes, and that as such it should register : in the State of Florida as required by that act and collect and remit to the State of Florida through its Comptroller the use tax imposed by the State on the mechanical writing instruments sold to Florida customers by Scripto, Inc. via

Adgif, the Chancellor ruled correctly.

The judgment is-Affirmed.

TERRELL, C.J., THOMAS, HOBSON and O'CONNELL, JJ., concur

[fol. 122]

IN THE SUPREME COURT OF FLORIDA

SCRIPTO, INC. a corporation organized and existing under the laws of the State of Georgia, Appellant,

Dale Carson, as Sheriff of Duyal County, Florida, and RAY E. GREEN, as Comptroller of the State of Florida, Appellees.

## JUDGMENT-October 17, 1958

This cause having heretofore been submitted to the Court . upon the transcript of the record of the judgment herein, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the Court that the said judgment of the Circuit Court be and the same is hereby affirmed; it is further ordered by the Court that the Appellees do have and recover of and from the Appellant costs in this behalf expended, herein taxed except the \$25.00 filing fee which has been paid by the Appellant, and that all costs shall be taxed in the court in which the appeal was entered, all of which is ordered to be certified to the Court below.

The Opinion of the Court in this cause prepared by Mr.

Justice Thornal was this day ordered to be filed.

[fol. 135]

IN THE SUPREME COURT OF FLORIDA

[Title omitted]

Order Denying Petition for Rehearing—December 3, 1958

On consideration of the Petition for Rehearing filed by Attorney for Appellant,

It is ordered by the Court that the said petition be, and

the same is hereby, denied.

[fol. 141]

IN THE SUPREME COURT OF THE STATE OF FLORIDA.

[Title omitted]

Motion to Extend Time for Filing Record and Docketing Appeal filed April 21, 1959

Appellant, Scripto, Inc., shows to the court as follows:

1.

Notice of Appeal to the Supreme Court of the United States was filed herein by Appellant on the 28th day of Ecbruary, 1959, Under the rules of the Supreme Court of the United States, the appeal in this case must be docketed and the record filed in that Court not later than April 29, 1959, unless an extension of time therefor be granted.

Mr. Davisson F. Dunlap, of counsel for the Appellant herein, has been continuously engaged in the trial of a case in the United States District Court for the Northern District of Florida during the four weeks preceding the filing of this motion.

3

For the foregoing reason, it will be impossible for counsel for the Appellant to complete the preparation of the jurisdictional statement and to docket the same with the Supreme Court of the United States within the time required by the rules of that Court, unless such time be extended by this Court.

[fol. 143]

4

Any Justice of this Court is authorized by Rule 13 (1) of the Rules of the Supreme Court of the United States to enlarge the time within which Appellant may docket the case and file the record thereof with the Clerk of the Supreme Court of the United States.

Wherefore, Appellant moves the Court for an order extending the time within which the record on appeal may be filed, and the appeal docketed in the Supreme Court of the United States to and including the 29th day of May, 1959.

Ernest P. Rogers of Smith, Kilpatrick, Cody, Rogers & McClatchey, 1045 Hurt Building, Atlanta 3, Georgia.

Clarence G. Ashby of Adair, Uhner, Murchison, Kent & Ashby, 1215 Barnett Bank Building, Jacksonville 2, Florida.

Attorneys for Scripto, Inc., Appellant.

[fol. 144] Proof of service (omitted in printing).

[fol. 145]

IN THE SUPREME COURT OF THE STATE OF FLORIDA

[Title omitted]

ORDER EXTENDING TIME TO DOCKET CASE ON APPEAL—April 21, 1959

The foregoing motion of Scripto, Inc., Appellant, for an extension of the time within which to docket this case in the Supreme Court of the United States, having been read and considered, and it appearing therefrom that there is a good and adequate cause for the granting of said motion,

It is ordered that Scripto, Inc., Appellant, be, and it is hereby, granted an extension of time until and including the 29th day of May, 1959, within which to file the record and docket this case on appeal in the Supreme Court of the United States.

This 21st day of April, 1959.

Glenn Terrell, Justice, Supreme Court of the State of Florida.

[fol. 147]

IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No. 29,426

Scripto, Inc., a corporation organized and existing under the laws of the State of Georgia, Appellant

Dale Carson, as Sheriff of Duval County, Florida, and Ray E. Green, as Comptroller of the State of Florida, Appellees

Notice of Appeal to the Supreme Court of the United States—filed February 28, 1959

1. Notice is hereby given that Scripto, Inc., the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme

Court of the State of Florida entered in this action on December 3, 1958, affirming that part of the final decree of the Circuit Court for Duval County which denied injunctive relief on the ground that the requirement of Chapter 212, Florida Statutes, that plaintiff collect a use tax for the State of Florida is not an unreasonable burden on interstate commerce, and does not deprive the plaintiff of its property with due process of law.

This appeal is taken pursuant to 28 U.S.C.A. §1257(2).

- II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:
  - 1. Bill of complaint of plaintiff.
  - 2. Answer of defendant, Al Cabill, Sheriff of Duval County, Florida.
  - [fol. 148] 3. Answer of defendant, Ray E. Green; Comptroller of the State of Florida
  - 4. Stipulation of Fact, executed and filed by the parties on September 30, 1957, including all Exhibits attached thereto, except Exhibit "B" which shall be excluded.
  - Stipulation of the parties as to admissibility of exhibits, filed November 12, 1957, including all exhibits therein described and identified, except Exhibits IV and VI which shall be excluded.
  - Final decree of the Circuit Court of Duyal County, Florida, dated December 13, 1957.
  - 7. Notice of Appeal to the Supreme Court of Florida, filed-by the plaintill on February 7, 1958.
  - 8 Motion for substitution of Dale Carson, as Sheriff of Duval County, Florida for Al Cahill, as Sheriff of said county, as a party defendant, and the order of court granting said motion.
  - 9. Assignments of Error, filed by the plaintiff on February 17, 1958.

- Opinion and judgment of the Supreme Court of Florida in said cause, Case No. 29,426, filed October 17, 1958.
- 11. Petition of appellant to the Supreme Court of Florida for a rehearing.
- 12. Appellees' reply to appellant's petition for rehearing.
- 13. Order and judgment of the Supreme Court of Florida denying appellant's petition for a rehearing, entered on December 3, 1958.
- 14. This Notice of Appeal.
- The entries of filing of each and all parts of the record above specified.
- III. The following questions are presented by this appeal:
  - [fol. 149] 1. Whether Chapter 212, Florida Statutes, and particularly Section 212,06(2)(g) thereof, is repugnant to the commerce clause, Article I, Section 8, of the Constitution of the United States, in that said statute, as construed and applied in this case, requires an out of state seller, doing no intrastate business in the State of Florida, to collect and remit a use tax to that State on merchandise sold exclusively in interstate commerce to Florida consumers, from orders solicited by independent brokers.
  - 2. Whether Chapter 212, Florida Statutes, and particularly Section 212,06(2)(g) thereof, is repugnant to the due process clause of Amendment XIV to the Constitution of the United States, in that said statute, as construed and applied is this case, requires an out of state seller to collect and remit a use tax to the State of Florida on merchandise sold to Florida consumers not by reason of any local business or activity of the seller in that State, but solely as a

result of orders solicited by independent brokers who are not agents or employees of the seller.

Ernest P. Rogers of Smith, Kilpatrick, Cody, Rogers & McClatchey, 1045 Hurt Building, Atlanta 3, Georgia.

Davisson F. Dunlap of Adair, Ulmer, Murchison, Kent & Ashby, 1215 Barnett Bank Building, Jacksonville, Florida.

Attorneys for Scripto, Inc., Appellant.

[fol. 150] Acknowledgment of service (omitted in printing).

fol. 151 | Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 152]

SUPREME COURT OF THE UNITED STATES

No. 80, October Term, 1959

Scripto, Ixc., et al., Appellant,

-1'8

DALE CARSON, as Sheriff of Duval County, Florida, et al.

Appeal from the Supreme Court of the State of Florida.

ORDER NOTING PROBABLE JURISDICTION October 12, 1959

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

October, 12, 1959